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Corrugated Carton Products Sdn Bhd v Kong Long Huat Realty Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–18 OF 2003 (W)
STEVE SHIM LIP KIONG CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND ABDUL HAMID MOHAMAD FCJJ
B 21 MAY 2004

Land Law — Sale of land — Construction of agreement — Extension of time to complete sale — Whether automatic — Whether purchaser required to give notice to land owner for extension of time to complete agreement

C The plaintiff agreed to purchase a piece of land from its registered owner, the defendant, for the sum RM550,000. The parties entered into an agreement ('the agreement') for the same on 11 October 1989 and the plaintiff paid RM50,000 to the defendant as a deposit. According to cl 3(a) of the agreement ('the said clause'), the balance was due within 90 days, ie before 9 January 1990. It also mentioned of a further extention of 30 days given to the plaintiff to D settle the balance of the purchase price and the imposition of interest on the balance of the purchase price during that period until the amount is fully settled.

On 10 January, the defendant served a notice to terminate the agreement when the plaintiff did not settle the outstanding balance.

E Dissatisfied, the plaintiff filed an action in the High Court against the defendant to complete the agreement by seeking specific relief, and alternatively, for damages. The High Court held for the defendant, stating that cl 3(a) did not grant the plaintiff an automatic extension to complete the agreement as contended. This decision was upheld by the Court of Appeal.

F The plaintiff appealed to this court and the issues to be decided were, firstly whether cl 3(a) of the agreement entitled the plaintiff an extension of time to complete, as of right; secondly whether cl 3(a) of the agreement requires or necessitated the plaintiff to "apply" or "ask" for the extension; and thirdly whether cl 3(a) merely required payment of interest for extension of time (assuming the same is payable) to be paid on a daily basis for the actual number of days of extension until the balance purchase price is settled.

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Held, dismissing the appeal:

(1) The plaintif should have interpreted cl 3(a) by reading the provision as a whole. This would have meant that the completion date was 90 days after the execution of the agreement but a further extension of 30 days H shall be given by the defendant upon payment by the plaintiff of interest on the outstanding balance of the purchase price at the rate of 8.5% per annum calculated on a daily basis during the extension period. With no interest paid by the plaintiff for the extension period and without any notification that an extension was needed despite the exchange of correspondence during the crucial period before and after I the expiry of the initial period of three months, it was not possible for the defendant to know that the plaintiff needed an extension to complete the agreement (see para 16).

(2) Both decisions of the High Court and the Court of Appeal on the interpretation of cl 3(a) of the agreement were upheld as firstly such a clause does not entitle the purchaser in the agreement an extension of time to complete, as of right; secondly, such a clause in a sale and purchase does require or necessitate the purchaser to apply for the extension; and thirdly, notification for the extension is essential before the expiry of the initial period and a written undertaking to pay, as opposed to actually paying, the interest for the extension period (see paras 17).

[Bahasa Malaysia summary

Plaintif bersetuju untuk membeli sebidang tanah daripada tuanpunya tanah berdaftar, iaitu defendan, dengan harga RM550,000. Pihak-pihak berkenaan telah membuat suatu perjanjian ('perjanjian') untuk tujuan tersebut pada 11 Oktober 1989 dan plaintif telah membayar RM50,000 sebagai deposit. Menurut kl 3(a) perjanjian ('klausa tersebut'), baki seharusnya dibayar dalam tempoh 90 hari, iaitu sebelum 9 Januari 1990. Ia juga menyebut akan perlanjutan tempoh 30 hari yang diberi kepada plaintif untuk menyelesaikan baki harga belian dan pengenaan faedah ke atas baki harga belian sehingga jumlah tersebut diselesaikan.

Pada 10 Januari, defendan telah menghantar notis untuk menamatkan perjanjian apabila plaintif tidak menyelesaikan baki tersebut.

Tidak berpuas-hati, plaintif telah memulakan tindakan di Mahkamah Tinggi terhadap defendan untuk menyempurnakan perjanjian tersebut dengan menuntut relif spesifik, dan sebagai ganti, untuk ganti rugi. Mahkamah Tinggi telah memberi keputusan yang memihak kepada defendan, dengan memutuskan bahawa kl 3(a) tidak membenarkan plaintif hak perlanjutan secara langsung untuk menyempurnakan perjanjian tersebut seperti yang dihujahnya. Keputusan ini disahkan oleh Mahkamah Rayuan.

Plaintif membuat rayuan ke mahkamah ini dan isu-isu yang perlu diputuskan adalah, pertamanya sama ada kl 3(a) perjanjian membenarkan plaintif suatu perlanjutan masa to penyempurnaan, melalui hak secara langsung; keduanya, sama ada kl 3(a) perjanjian memerlukan, atau menghendaki plaintif untuk "memohon" atau "meminta" untuk perlanjutan tersebut; dan ketiganya, sama ada kl 3(a) hanya memerlukan pembayaran faedah untuk perlanjutan (dengan anggapan bahawa ia perlu dibayar) harus dibuat pada kadar harian untuk jumlah hari tambahan sehingga baki harga belian diselesaikan.

Diputuskan, menolak rayuan tersebut:

(1) Plaintif sepatutnya mentafsirkan kl 3(a) perjanjian dalam aspek keseluruhannya. Ini akan membawa makna tarikh penyempurnaan adalah 90 hari selepas pelaksanaan perjanjian tetapi penambahan lanjutan 30 hari akan diberi kepada plaintif daripada defendan selepas bayaran faedah dibuat ke atas harga belian dengan kadar 8.5% setahun yang ditaksir pada kadar harian semasa tempoh perlanjutan. Dengan

ketiadaan pembayaran faedah atas tempoh perlanjutan oleh plaintif dan tanpa apa-apa pemberitahuan bahawa suatu perlanjutan diperlukan walaupun terdapat penukaran surat-menyurat semasa saat-saat penting sebelum dan selepas penamatan tempoh tiga bulan pertama, adalah tidak mungkin untuk defendan mengetahui sama ada plaintif memerlukan lanjutan masa untuk menyempurnakan perjanjian tersebut (lihat perenggan 16).

(2) Kedua-dua keputusan Mahkamah Tinggi dan Mahkamah Rayuan berkenaan interpretasi kl 3(a) perjanjian disahkan kerana pertamanya klausa sebegitu tidak memberikan hak mutlak kepada plaintif untuk penyempurnaan; keduanya klausa sedemikian sememangnya menghendaki pembeli memohon untuk perlanjutan; ketiganya, notifikasi untuk perlanjutan adalah penting sebelum penamatan tempoh awal dan suatu akujanji secara bertulis untuk membuat pembayaran, berbanding dengan membuat bayaran dengan sebenarnya untuk tempoh perlanjutan tersebut (lihat perenggan 17).

Notes

For cases on extension of time to complete sale, see 8(2) *Mallal's Digest*, (4th Ed, 2001 Reissue) paras 3634–3636

Cases referred to

Corrugated Carton Products Sdn Bhd v Kong Long Huat Realty Sdn Bhd [2003] 3 MLJ 193 (refd)
Jeow Fong Mei (P) v Chong Mee Yoke (P) [1996] 1 MLJ 387 (distd)

Legislation referred to

Rules of the High Court 1980, O 33 r 2, 81
Specific Relief Act 1950, s 18(2)

Dr Wong Kim Fatt (Christina Chia Li Eng & Khor Loke Yew with him) (M/s Christina Chia Ng & Partners) for the appellant
Karpal Singh (M/s Karpal Singh & Co) for the respondent

Appeal from: Civil Appeal No W–02–82 of 1999 (Court of Appeal, Kuala Lumpur)

Abdul Malek Ahmad FCJ (delivering judgment of the court):

[1] The respondent is the registered proprietor of land held under Lot No. 8761, CT 25148, Mukim Kajang in Selangor. The appellant entered into a sale and purchase agreement dated 11 October 1989 with the respondent to purchase it at the agreed price of RM550,000. At the time of execution of the agreement, the appellant had paid the respondent RM50,000 and by cl 3(a) thereof, the appellant was to pay the balance of RM500,000 on or before 9 January 1990.

[2] It is appropriate to reproduce cl 3(a) of the agreement at this juncture:

> 3(a) Completion of the sale and purchase hereunder of the said property shall take place within a period of Ninety (90) days from the date of this Agreement (hereinafter referred to as "the Completion Date"). Provided always and it is hereby agreed by and between the parties hereto that the Vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the completion date but upon payment of interest on the outstanding balance of the purchase price at the rate of eight point five per centum (8.5%) per annum calculated on a daily basis during the period of extension.

[3] By letter dated 2 January 1990, the solicitors for the appellant's financier informed the solicitors for the respondent that they were agreeable to release the balance of the purchase price to the solicitors for the respondent upon receipt of the issue document of title and certain undertakings from them. These terms were repeated in a subsequent letter from the solicitors for the appellant's financier dated 10 January 1990.

[4] The solicitors for the appellant, also by letter dated 10 January 1990, informed the solicitors for the respondent that the appellant had complied with cl 3(a) of the agreement and were not liable to payment of interest under cl 3(a) thereof. On that same date, the solicitors for the respondent had informed the appellant that the respondent was terminating the agreement with immediate effect and promised to refund the deposit paid by the appellant.

[5] The solicitors for the appellant informed the solicitors for the respondent by letters dated 12 January 1990 and 2 February 1990 that the appellant did not accept the respondent's unfair termination made unilaterally and reiterated that the appellant was ready, able and willing to complete the transaction. Accordingly, the appellant filed an action against the respondent asking for specific relief, and alternatively, for damages.

[6] The appellant's application for summary judgment under Order 81 of the Rules of the High Court 1980 (hereinafter "the RHC") was dismissed by the High Court which held that there were issues of law and fact to be tried.

[7] The appellant then filed a summons in chambers for an order that the following issues be heard pursuant to O 33 r 2 of the RHC namely:

(a) whether cl 3(a) of the agreement dated 11 October 1989 entered into between the plaintiff as purchaser and defendant as vendor relating to that piece of land held under CT 25148 Lot No 8761 Mukim Kajang, Daerah Ulu Selangor, Selangor Darul Ehsan, entitles the plaintiff to an automatic extension of 30 days for completion upon payment of interest of 8.5% per annum calculated on a day to day basis during the extension period;

(b) other related issues including whether the said agreement of sale and purchase was validly terminated.

[8] The learned High Court judge held that the extension of time under cl 3(a) of the agreement was not automatic but subject to the payment of interest and the appellant had failed to pay the balance of the purchase price

on 9 January 1990. It was also clear, she said, that under cl 14 of the agreement, time was of the essence and it was crucial for the balance of the purchase price to be paid on or before 9 January 1990 should the extension of time is not obtained.

[9] She added that there was no evidence that the appellant had applied for the extension of time when they could not pay the balance of the purchase price. She also said that no other action was taken to show that the appellant had done all that they were required to do and this was fatal to a claim for specific relief. Not only did the appellant not pay the balance of the purchase price within the agreed period, she said, but they had not asked for the extension of time from the respondent knowing that the balance of the purchase price could not be paid on the expiry date of the agreed period.

[10] The claim for specific relief was dismissed with costs. However, the learned High Court judge referred to s 18(2) of the Specific Relief Act 1950 which states:

> If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

[11] She said the termination of the contract was due to the appellant and not the respondent and, therefore, she dismissed the appellant's claim for damages. She, however, allowed the respondent's claim for the RM50,000 deposit to be forfeited to the respondent based on cl 9 of the agreement which states:

> 9. In the event that the Purchasers fail for any reason whatsoever (save and except upon the rescission of the sale and purchase referred to in cls 11 & 12 hereunder) to complete the sale and purchase of the said property the Vendor shall forfeit from the Deposit paid herein the sum of Ringgit Fifty Thousand (RM50,000) only as agreed liquidated damages and cause the remainder of the Deposit and all other monies paid hereunder by the Purchaser to be refunded to the Purchasers and the Purchasers shall where vacant possession of the said property has been delivered re-deliver vacant possession of the same to the Vendor and thereafter neither party shall have any claim against the other and the Vendor shall be at liberty to sell or otherwise deal with the said property in such manner and to and with such persons as the Vendor shall deem fit without tendering or offering the said property to the Purchasers.

[12] Dissatisfied with this decision, the appellant appealed to the Court of Appeal. The Court of Appeal agreed with the finding of the High Court, as regards cl 3(a) of the agreement, as can be seen from the relevant excerpts of the Court of Appeal judgment reproduced below:

> Reverting to the present case we agree that the words "shall grant" appearing in cl3(a) taken by themselves would mean that the defendant is under obligation to grant the extension to the plaintiff without the plaintiff having to apply for the extension. However, as stated above word or words in an agreement ought not to be construed in isolation, they need to be construed within the context of the agreement as a whole. Looking at cl 3(a) it is clear that the plaintiff is required to complete the purchase of said property within 90 days of the date of the

agreement. This 90-day period, however, is subject to a further extension of 30 days upon payment of interest by the plaintiff on the balance sum at the stipulated rate. The question that arises is whether this interest is payable only if the plaintiff decides to proceed with the purchase or is payable in any case whether the plaintiff decides to proceed with the purchase or otherwise. We think the answer to this question is crucial to the issue before us whether the plaintiff needs to give notice of its intention to have the Complete Date extended or otherwise. What cl 3(a) provides is that the purchaser is entitled to an extension of the completion date "upon payment of interest on the outstanding balance … ." In our view, the plain meaning of this would be that the purchaser will have to pay interest on the balance sum if he wants to have the completion date extended. Thus, by necessary implication, in order to bring this provision into effect it is incumbent upon the purchaser to notify the vendor of his intention to have the completion date extended.

In the present case not only the plaintiff failed to notify the defendant of its desire to have the completion date extended but in its solicitors' letter of 10 January 1990 the plaintiff contended that it is not obliged to pay the interest on the balance sum since it has fulfilled all its obligations under cl 3(c).

However, from the undisputed facts before the court we find that on the completion date neither the balance of the purchase price had been paid nor the necessary undertaking had been furnished to the stakeholders. Further, as we have said earlier, the plaintiff also failed to notify the defendant of its intention to have the completion date extended. Therefore, based on those facts we are of the view that the defendant was clearly acting within its right in terminating the agreement vide its letter of 10 January 1990.

[13] Apparently, learned counsel for the appellant relied heavily on the case of *Jeow Fong Mei (P) v Chong Mee Yoke (P)* [1996] 1 MLJ 387 to substantiate his point about the automatic right to the extension period but the issue there is clearly distinguishable as the expiry date of the extension period was in issue and the termination was sent one day too early. Here, there is no dispute as to the expiry date of the initial three-month period.

[14] As regards the respondent's counterclaim, the Court of Appeal varied the order of the learned High Court judge by summarising the situation in the following manner.

Looking at the order of court dated 3 January 1999 it is clear that the learned judge had allowed the counterclaim by the defendant for the sum of RM50,000 and further ordered that an interest of 8% pa be paid on the said sum to be calculated from 9 January 1990 until full payment. From the facts before the court it is not in dispute that the said sum of RM50,000 was paid by the plaintiff to the defendant on or before the execution of agreement pursuant to cl 2(a). This is further confirmed by the defendant's letter of 10 January 1990 in which the defendant proposed that all the deposits paid by the plaintiff be refunded to the plaintiff. Therefore, we agree with the contention of the plaintiff that it is erroneous on the part of the court to allow the counterclaim by the defendant on those terms. In our view that the correct order would have been that the sum of RM50,000 being the deposit paid under the agreement be forfeited to the plaintiff pursuant to cl 9. Since the said deposit had already been paid to the defendant therefore the order by the learned judge for payment of interest by the plaintiff on the said sum also ought to be set aside.

There is one other issue raised by the plaintiff's counsel with regard to the forfeiture of the deposit. He contended that since the defendant in its letter of 10 January 1990

offered to refund all deposits to the plaintiff therefore rightly no order of forfeiture of the deposit should, in the circumstances, be made against the plaintiff. Learned counsel for the defendant countered by saying that the offer for refund was made with a view of the parties reaching an amicable settlement on the matter, however, since the plaintiff had elected to commence legal action against the defendant the offer could not be taken against the defendant. Reading the relevant part of the letter we agree with the contention of the learned counsel for the defendant that the offer to refund the deposit made by the defendant is subject to the plaintiff agreeing to treat the agreement as null and void. Since the plaintiff refused to treat the agreement as null and void, therefore, naturally the offer no longer stands. In the circumstances, we think the defendant is entitled to have the deposit forfeited in accordance with cl 9.

Conclusion

For the above reasons we dismissed the plaintiff's appeal herein with costs, however, the order of the court directing the plaintiff to pay to the defendant the sum of RM50,000 together with interest of 8% p.a. thereon is hereby set aside and we substitute, therefore, with an order that the sum of RM50,000, being the deposit paid to the defendant, be forfeited to the defendant.

[15] On 10 November 2003, this court gave leave to the appellant to appeal on the following questions:

(a) whether a clause in a sale and purchase agreement such as that found in cl 3(a) of the said agreement entitles the purchaser in the agreement an extension of time to complete, as of right;

(b) whether a clause in a sale and purchase agreement such as that found in cl 3(a) of the said agreement requires or necessitates the purchaser to "apply" or "ask" for the extension;

(c) whether a clause in a sale and purchase agreement such as that found in cl 3(a) of the said agreement merely requires payment of interest for extension of time (assuming the same is payable) to be paid on a daily basis for the actual number of days of extension when the balance purchase price is paid.

[16] In these circumstances, we are of the view that the appellant fell into error when they attempted to give an interpretation to cl 3(a) of the agreement on a piecemeal basis instead of reading the provision as a whole. Read in its entirety, it is clear beyond any doubt that the completion date is ninety days after the execution of the agreement but a further extension of thirty days shall be given by the respondent upon payment by the appellant of interest on the outstanding balance of the purchase price at the rate of 8.5 per cent per annum calculated on a daily basis during the extension period. With no interest paid by the appellant for the extension period and without any notification that an extension was needed despite the exchange of correspondence during the crucial period before and after the expiry of the initial period of three months, how was the respondent to know that the appellant needed an extension to complete the agreement?

[17] Having considered the authorities and the arguments, we are in full agreement with the findings of the High Court and the Court of Appeal as

regards the interpretation of cl 3(a) of the agreement and would answer the first question in the negative, the second question in the positive and the third question in the positive but we must add that, for the third question, a notification for the extension is essential before the expiry of the initial period and a written undertaking to pay, as opposed to actually paying, the interest for the extension period, would have sufficed.

[18] Accordingly, we would dismiss the appeal with costs. The deposit is to go to the respondent to the account of taxed costs.

Appeal dismissed with costs

Reported by M Maheswaran